Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Sibron* v. *New York*, 392 U.S. 40 (1968), this Court held that a habeas petitioner's challenge to a criminal conviction is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Id.* at 57. The Court has consistently held that one collateral consequence sufficient to prevent mootness is the possibility that the conviction under review might be used to enhance the petitioner's sentence for any subsequent criminal conviction. See, *e.g.*, *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969). Because sentence enhancements will result from virtually every criminal conviction, this Court has instructed the lower courts to presume the existence of collateral consequences in the context of challenges to the validity of criminal convictions. See *Sibron*, 392 U.S. at 55-57. In this case, the Eighth Circuit disregarded the concession by the United States that collateral consequences were present because of the sentencing enhancements imposed by federal law as a result of Hohn's conviction, and it dismissed the case as moot. Thus, two questions are presented:

1. Whether this Court continues to adhere to its precedent that the possibility of future sentence enhancements is sufficient to prevent a challenge to a criminal conviction from becoming moot.

2. Whether, contrary to the decisions of the other courts of appeals, the Eighth Circuit was correct in finding that the presumption of collateral consequences under *Sibron* can be overcome when neither evidence nor argument has been presented to rebut the presumption.

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PETITION FOR A WRIT OF CERTIORARI

Arnold F. Hohn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's decision (App., *infra*, 1a-13a) is reported at 262 F.3d 811. The district court's opinion (App., *infra*, 14a-17a) is unreported.

JURISDICTION

The Eighth Circuit filed its opinion on August 22, 2001, App., *infra*, 1a, and it denied Hohn's timely petition for rehearing en banc (with three judges dissenting) on December 5, 2001. App., *infra*, 18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that the judicial power of the United States "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and "to Controversies to which the United States shall be a Party."

STATEMENT OF THE CASE

Petitioner Arnold Hohn was convicted for conduct — purportedly "using" a firearm in violation of 18 U.S.C. § 924(c) by merely having it available during the possession of a controlled substance — that this Court held in *Bailey* v. *United States*, 516 U.S. 137 (1995), is not a crime. After learning of the *Bailey* decision, Hohn filed his first and only motion pursuant to 28 U.S.C. § 2255 seeking to have his conviction vacated.

For the past six years, Hohn has attempted to obtain relief for this clear violation of his constitutional rights. When the Eighth Circuit first refused to entertain his appeal, Hohn sought certiorari from this Court, which granted the writ for the express purpose of evaluating its subject matter jurisdiction. The Court ultimately determined that it did have subject matter jurisdiction and — finding Hohn's constitutional claims "important and meritorious" (*Hohn* v. *United States*, 524 U.S. 236, 250 (1998)) — remanded for further proceedings. The Eighth Circuit has now refused to hear Hohn's claims for a second time, under the theory that this Court was wrong to find that it had subject matter jurisdiction over this dispute, because the case is now and was then moot.

* * *

In 1990, Hohn was indicted for possession of firearms by a felon under 18 U.S.C. §§ 922(g) and 924(a); possession of a controlled substance near a school with intent to distribute it under 21 U.S.C. §§ 841(a) and 845a; and "us[ing] or carr[ying] a firearm" "during and in relation to" the drug offense, under 18 U.S.C. § 924(c)(1). App., *infra*, 2a.[1] At trial, no witness testified that Hohn had ever used or carried any weapon, much less done so "during and in relation to" the predicate drug offense.

Hohn was convicted on all three counts of the indictment and in July 1992 was sentenced to incarceration for 90 months — 60 months for the Section 924(c) conviction and 30 months (to be served consecutively) for other crimes. He was also sentenced to a six-year term of supervised release on the drug count and concurrent three-year terms of supervised release on

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[1] Citations to "App." are to pages in the attached Petitioner's Appendix. Citations to "A.A." are to the Appellant's Appendix, which was filed contemporaneously with Hohn's opening brief on the merits before the Eighth Circuit.

the other two counts. App., *infra*, 3a. Hohn was released from prison on October 30, 1997, but remains under supervised release.

Hohn did not challenge his Section 924(c) conviction on direct appeal, because such a challenge would have been frivolous under the Eighth Circuit's case law at the time. Hohn's conviction was affirmed on direct appeal. *United States* v. *Hohn*, 8 F.3d 1301 (8th Cir. 1993).

Two years later, this Court decided *Bailey*, which made clear that Hohn had been sentenced to serve five years in a federal prison for conduct that was not a crime. Hohn therefore moved on January 24, 1996, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[2] The district court dismissed Hohn's motion on the grounds that Hohn had "waived" his right to relief by failing to "raise his *Bailey* claim" on direct appeal, several years before *Bailey* was decided. A.A. 113-114.

The Eighth Circuit interpreted Hohn's *pro se* notice of appeal as a request for a certificate of appealability, and it denied Hohn's "request" for a certificate on the ground that Hohn's incarceration for conduct that is not made criminal by 18 U.S.C. § 924(c) involved only a statutory and not a constitutional claim. See *Hohn* v. *United States*, 99 F.3d 892, 893 (8th Cir. 1996). Hohn's petition for rehearing en banc was denied with four judges dissenting. In response to Hohn's certiorari petition, the United States government confessed error, acknowledging that claims such as Hohn's may fairly be characterized as constitutional. The United States suggested

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[2] In his Section 2255 motion, drafted *pro se*, Hohn argued that "his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by *Bailey*." *Hohn* v. *United States*, 99 F.3d 892, 893 (8th Cir. 1996) (dissenting opinion of McMillian, J.).

that the Eighth Circuit's judgment be vacated and that the case be remanded in light of the government's new position.

This Court instead granted certiorari to decide whether it had subject matter jurisdiction over the case. Following briefing and argument on the jurisdictional question, the Court held that it did indeed have subject matter jurisdiction. See *Hohn*, 524 U.S. at 239 ("The Court, we hold, does have jurisdiction."). Finding that Hohn's *Bailey* claim was "important and meritorious," *id.* at 250, the Court vacated the Eighth Circuit's judgment and remanded the case.

On remand, the Eighth Circuit acknowledged that Hohn's *Bailey* claim was not waived, but rather was procedurally defaulted. *Hohn* v. *United States*, 193 F.3d 921, 923 (8th Cir. 1999). The court expressly found that "Hohn is actually innocent of 'using' a firearm during and in relation to a drug trafficking offense" (*id.* at 924), and it remanded to the district court to determine whether Hohn was actually innocent of "carrying" a firearm during and in relation to a drug-trafficking offense. *Ibid.*

The district court found that Hohn had failed to demonstrate that he was actually innocent of "carrying" under Section 924(c). App., *infra*, 16a-17a. The court did not attempt to explain how such a conclusion could be reconciled with the prosecutor's explicit admission at Hohn's trial that he ***had no idea*** whether Hohn was carrying a gun at the time of the alleged offense under Section 924(c). See A.A. 102 ("We don't know whether he had a firearm when he went into the house. We really don't know.").

Nonetheless, finding that reasonable jurists could disagree as to the merits of Hohn's claim, the district court granted a certificate of appealability, and Hohn appealed again to the Eighth Circuit. After hearing argument on the merits of Hohn's appeal, a panel of the Eighth Circuit issued a decision

dismissing the case as moot. App., *infra*, 1a. The court was unmoved by the express concession on the part of the United States that jurisdiction was indisputably present because federal law requires that Hohn's conviction under Section 924(c) be used to enhance his sentence for any subsequent violation of that statute. *Id.* at 11a; see also Brief of Appellee at 9 n.1 (in which the United States explained to the Eighth Circuit in a footnote of its brief on the merits that "this matter is not moot").

Although the court cited this Court's case law to the effect that it was supposed to presume that jurisdiction existed (App., *infra*, 10a), it felt that future sentence enhancements should not be used to confer jurisdiction in this case. The court explained that such enhancements were "contingent upon Hohn committing another crime, something that is within his power to prevent from occurring." *Id.* at 11a. The court also believed that it lacked jurisdiction because Hohn had been sentenced to a longer concurrent term of supervised release on a conviction that he was not challenging than the term to which he had been sentenced on the Section 924(c) count. *Id.* at 6a-7a.

The court never afforded the parties any notice that it questioned its jurisdiction, nor any opportunity to be heard on the jurisdictional question. Rather, it dismissed the case *sua sponte*, without argument or briefing, because it "simply cannot think of any concrete statutory collateral consequence" that would necessarily result from Hohn's conviction under Section 924(c). App., *infra*, 13a.

Hohn filed a timely petition for rehearing. When the Eighth Circuit called for the government's response to Hohn's petition, the United States abruptly changed its position on the jurisdictional question. Prior to that submission, the United States had been consistent in representing to the federal courts that this case was not moot because of the federal statute

requiring an enhanced sentence for any subsequent conviction under Section 924(c). Notwithstanding the fact that the basis for its understanding that the case was not moot had absolutely nothing to do with the length of Hohn's supervised release, the government cited as its reason for its change of heart that it "had not performed the requisite math and determined that the term of supervised release imposed on the Section 924(c) conviction had recently expired." United States' Response To Appellant's Petition For Rehearing With Suggestion Of Rehearing En Banc, at 9.

On December 5, 2001, the Eighth Circuit denied Hohn's petition. App., *infra*, 18a. Judges Loken, Bye and William Jay Riley dissented from the denial of rehearing en banc. *Ibid.*

REASONS FOR GRANTING THE WRIT

For decades, this Court has consistently adhered to the principle that a challenge to a criminal conviction is moot only if there is "no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Thus, this Court has repeatedly held that a challenge to a criminal conviction is not moot if there is even a remote possibility that the challenged conviction could subject the petitioner to an enhanced sentence for a future offense. See, *e.g.*, *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977); *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969). In this case, after recognizing that Hohn's Section 924(c) conviction would expose him to a mandatorily enhanced sentence for any future violations of the statute, the Eighth Circuit nonetheless dismissed this case as moot.

Perhaps because it acted without briefing or other guidance on the jurisdictional question, the Eighth Circuit directly contravened this Court's binding precedent in several areas.

Thus, it found Hohn's case moot on the basis of a longer term of supervised release imposed concurrently on another count (see App., *infra*, 6a-7a), ignoring this Court's instruction "that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." *Benton*, 395 U.S. at 790. It disregarded this Court's precedent that future sentence enhancements always constitute collateral consequences when habeas petitioners challenge their criminal convictions. It then engaged in an extensive search for other specific collateral consequences, ignoring this Court's instruction that it has "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." *Sibron*, 392 U.S. at 55. The decision below warrants summary reversal.

If the Court declines to reverse, it should grant certiorari to resolve a deeply entrenched circuit split regarding how to implement the presumption of justiciability in criminal conviction challenges. In this case, after the United States had affirmatively conceded that there were collateral legal consequences to Hohn's conviction and that the case was therefore not moot, the Eighth Circuit proceeded *sua sponte* to disregard the presumption and dismiss the case. Although the Eighth Circuit's approach is manifestly contrary to this Court's precedent, its confusion is reflective of broader uncertainly among the courts of appeals, which have developed four different approaches to implementing the presumption. The split concerns an important and recurring issue of federal law, and the positions taken by several of the circuits (including the court below) threaten to deprive habeas petitioners of any opportunity of obtaining relief for a conviction of a federal crime that has been unconstitutionally imposed. Further review is therefore warranted.

I. THE EIGHTH CIRCUIT DISREGARDED THIS COURT'S PRECEDENTS ESTABLISHING THAT A POSSIBILITY OF COLLATERAL CONSEQUENCES, INCLUDING FUTURE SENTENCE ENHANCEMENTS, PRECLUDES A FINDING OF MOOTNESS

The Court should summarily reverse the decision below because the Eighth Circuit contravened decades of this Court's precedents by holding that the possibility that Hohn's Section 924(c) conviction would be used to enhance his sentence for future offenses was not a sufficient collateral consequence to make his case justiciable.

As this Court has repeatedly made clear, when challenges to criminal convictions bear the possibility of collateral consequences — expressly including the possibility that the conviction may be used to trigger sentence enhancements for future crimes — they are ***always*** justiciable. See *Spencer* v. *Kemna*, 523 U.S. 1, 9-12 (1998) (recognizing the rule in the context of challenges to criminal convictions and declining to extend it to challenges to parole revocations); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977); *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969); *Sibron* v. *New York*, 392 U.S. 40, 55-57 (1968).

The general rule that this Court has established is that a challenge to a criminal conviction is moot "only if it is shown that there is ***no possibility*** that ***any*** collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron*, 392 U.S. at 57 (emphasis added). Because, under the federal sentencing guidelines, prior criminal convictions will almost always be used to enhance a petitioner's sentence for any subsequent crime, criminal convictions — and

particularly felony convictions — will give rise to collateral legal consequences in virtually every case. For that reason, the Court has "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." *Id.* at 55.

The Court's observation that "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences," *Spencer*, 523 U.S. at 12 (internal quotation marks omitted), certainly holds true in the particular circumstances of this case. Should Hohn ever face another Section 924(c)(1) conviction, his Section 924(c) conviction that is being challenged in this case will result in Hohn being subject to a minimum twenty-five-year prison sentence, and possibly up to life imprisonment. 18 U.S.C. § 924(c)(1)(C).[3] Were Hohn to prevail in this case, any future conviction would otherwise carry a minimum sentence of only five years. 18 U.S.C. § 924(c)(1)(A). Although Hohn is subject to several other collateral consequences as a result of his Section 924(c) conviction,[4] the enhancement provided in Section 924(c) for recidivist offenders leaves no doubt that this case is justiciable. Under federal law, Hohn stands in a considerably worse position as a result of his conviction under Section 924(c) than he would if he succeeded in having that unconstitutional conviction vacated. It is precisely this ironclad statutory

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[3] The sentence will be at least twenty-five years, but if the firearm is either (i) a machine gun or destructive device, or (ii) equipped with a silencer or muffler, the sentence will be life imprisonment. 18 U.S.C. § 924(c)(1)(C).

[4] These other collateral consequences include, among other things, the risk of having his testimony impeached at any subsequent trials as a result of the present conviction, see *Sibron*, 392 U.S. at 55-56; *Evitts*, 469 U.S. at 391 n.4, and the possibility of receiving an enhanced sentence for other subsequent crimes under the sentencing guidelines as a result of a higher criminal history rating.

collateral consequence that the United States invoked in its merits brief in the Eighth Circuit as proof that "this matter is not moot." Brief of Appellee at 9 n.1.

The Eighth Circuit proffered three reasons for its unwillingness to follow the established law in this area. First, it rejected the United States' admission that jurisdiction was present by claiming that "the government's proposed collateral consequence in this case is contingent upon Hohn committing another crime, something that is within his power to prevent from occurring." App., *infra*, 11a.[5] That statement reflects a wholesale rejection of this Court's precedent. Whether habeas petitioners commit subsequent crimes is a matter that has always been within their power to prevent. But for over forty years, this Court has been adamant in holding that the prospect of enhancement of subsequent criminal sentences is always sufficient to confer jurisdiction on a challenge to a criminal conviction — even though it is to some degree speculative whether the petitioner will commit other crimes and actually experience the adverse consequences. See *Benton*, 395 U.S. at 790-791 ("Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable.").

In 1993, for example, this Court held that a challenge to a "diversionary scheme" (*i.e.*, a disposition under which, after the petitioner had served his sentence of two years of probation, the underlying criminal charges were ***dismissed***) was justiciable

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[5] In support of this justification, the Eighth Circuit cited this Court's decision in *Spencer*. That citation strongly suggests that the court had improperly decided to apply the law governing the justiciability of challenges to parole revocations rather than the law governing the justiciability of challenges to criminal convictions. We demonstrate *infra* (at 13-15) why *Spencer* did not overrule this Court's prior precedent and why it does not support a finding of mootness here.

because of the possibility that the disposition could be used in calculating the defendant's criminal history category "in the event of a subsequent federal conviction." *Minnesota* v. *Dickerson*, 508 U.S. 366, 371-372 n.2 (1993). This Court's other cases are unanimous in rejecting the Eighth Circuit's logic. See, *e.g.*, *Mimms*, 434 U.S. at 108 n.3; *Evitts*, 469 U.S. at 391 n.4.

Second, this Court just explained in *Spencer* that "[a]n incarcerated convict's (***or a parolee's***) challenge to the validity of his conviction ***always satisfies the case-or-controversy requirement***." 523 U.S. at 7 (emphasis added). Hohn, of course, remains on supervised release (the federal equivalent of parole), and his case therefore unquestionably satisfies the case-or-controversy requirement. But the Eighth Circuit refused to obey this Court's instruction in *Spencer* based on its assumption that — because Hohn was convicted of other crimes and sentenced to a longer concurrent term of supervised release on one of the convictions that is not presently being challenged — reversal of the Section 924(c) conviction would not hasten Hohn's discharge from supervised release or otherwise inure to Hohn's benefit in any immediate way. The court also apparently believed it was writing on a blank slate with respect to this issue, opining that this Court's cases "did not examine whether the convictions at issue produced collateral consequences independent from any other convictions in the petitioners' records." App., *infra*, 12a; see also *id.* at 6a-7a.

The latter statement was simply wrong. As the leading commentator has explained, this Court ***has*** held that

> a defendant convicted of two crimes, but sentenced to concurrent sentences, may challenge one of the convictions even though its reversal would not hasten his or her release from custody. The Court has

> reasoned that the additional conviction might have future collateral consequences, such as by increasing the severity of a subsequent sentence if there is a new offense.

ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.2, at 131 (3d ed. 1999) (citing, *e.g.*, *Benton*, 395 U.S. at 790-791).

One case directly on point is *Benton*, in which the petitioner had been convicted of both burglary and larceny, and had received a sentence of 15 years on the burglary count and a concurrent sentence of 5 years on the larceny count. In entertaining a habeas petition challenging the larceny count, this Court inquired into its own jurisdiction because "reversal of [the larceny] conviction would not require the State to change the terms of petitioner's confinement." 395 U.S. at 787-788. After a thorough analysis, the Court concluded that "the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." *Id.* at 790. The Court's explanation applies equally here:

> For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable.

Id. at 790-791.

The Eighth Circuit's decision in this case is a direct repudiation of the rule in *Benton*. Compare App., *infra*, 6a-7a (holding that "Hohn's case is moot under the general mootness

inquiry" because "Hohn's three-year term of supervised release for his § 924(c)(1) conviction runs concurrent to the six-year term of supervised release stemming from his conviction under §§ 841(a) and 845a") with *Benton*, 395 U.S. at 790 (holding that this Court's cases "make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy"). Summary reversal is appropriate for this reason alone.

Finally, although the Eighth Circuit twice acknowledged (App., *infra*, 10a, 12a) that, in *Spencer*, this Court did not overrule the *Sibron* line of cases, it nonetheless suggested that *Spencer* might have signaled the Court's intent to move in that direction. Whatever *Spencer* signified for the future, it is undeniable that it did not make any change in the well-established law governing the mootness of habeas petitions challenging criminal convictions.

The issue in *Spencer* was whether the presumption of collateral consequences that had long existed in the context of attempts to vacate criminal convictions should be ***extended*** to attempts to overturn parole revocations. Although the Court recognized and reaffirmed the well-established practice of presuming collateral consequences in cases involving challenges to criminal convictions (see 523 U.S. at 10-12), it declined to extend the *Sibron* line of cases to the parole revocation context, explaining that different considerations apply:

> [O]f particular relevance to the question whether the practice of presuming collateral consequences should be extended to challenges of parole termination: In the context of criminal conviction, the presumption of significant collateral consequences is likely to comport with reality. As we said in *Sibron*, it is an "obvious fact of life that most criminal convictions do in fact entail

> adverse collateral legal consequences." The same cannot be said of parole revocation.

Spencer, 523 U.S. at 12 (quoting *Sibron*, 392 U.S. at 55). It is therefore clear that the *Spencer* Court in no way intended to overrule the *Sibron* line of cases in the context of challenges to criminal convictions.[6]

Even if the Eighth Circuit believed that this Court might wish at some point to reconsider its precedents in the context of challenges to criminal convictions (see, *e.g.*, App., *infra*, 12a (opining that *Spencer* was "strongly critical of *Pollard* and its progeny")), the court did not have the power to disregard what is undeniably still governing law. This Court has explained that lower courts ***must*** follow its precedent, and that only the Court itself may determine whether its own precedent has been overruled. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving

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[6] The court below quoted dicta from a recent Seventh Circuit case expressing the opinion that this Court's decision in *Spencer* had attempted to bring habeas law into conformance with a recent toughening of standing requirements. See App., *infra*, 11a (quoting *Diaz* v. *Duckworth*, 143 F.3d 345, 347 (7th Cir. 1998)). The court below misconstrued *Diaz*. In that case, the Seventh Circuit continued to recognize after *Spencer* that, under *Sibron*, a risk of collateral consequences, including the prospect of a sentence enhancement, was sufficient to prevent mootness in challenges to criminal convictions. See 143 F.3d at 345. To the *Diaz* court, the only "difficult question is whether the burden of establishing collateral consequences ***of a judgment other than conviction*** can, after *Spencer*, ever be carried when * * * the only consequences of which the defendant is complaining are contingent upon his committing future crimes or future disciplinary violations." *Id.* at 346 (emphasis added). Thus, the Eighth Circuit's citation to *Diaz* does not support its analysis in this case. Rather, it only confirms that the court had departed from the law governing the justiciability of challenges to criminal convictions.

to this Court the prerogative of overruling its own decisions."). Ironically, the Court reaffirmed the point ***in this very case***. See *Hohn*, 524 U.S. at 252-253 ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

Summary reversal is warranted here because the issue presented is an important and recurring issue of federal law on which this Court's instruction would be valuable. Enhancements to the sentence of any subsequent crime are collateral consequences that will be present in every habeas case challenging a criminal conviction. The federal sentencing guidelines expressly look to prior criminal history as a factor in imposing longer sentences for subsequent crimes. The same is true in all 50 states. See, *e.g.*, *Daniels* v. *United States*, 523 U.S. 374, 380 (2001) ("each of the 50 States has a statute authorizing enhanced sentences for recidivist offenders"). By reaffirming its established law through a summary reversal in this case, the Court can prevent lower courts from engaging in the waste of judicial resources that would result from ignoring these collateral consequences and engaging in needless searches for other consequences.

The Eighth Circuit departed from decades of this Court's precedents and from the established practice of every other court of appeals[7] by holding that the possibility of collateral

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[7] Before the Eighth Circuit's decision in this case, every circuit that had considered the risk of enhanced future sentencing in the context of cases involving challenges to criminal convictions had classified the risk of an increased sentence as a collateral consequence sufficient to prevent mootness. See, *e.g.*, *Wood* v. *Hall*, 130 F.3d 373, 376 n.1 (9th Cir. 1997); *Puchner* v. *Kruziki*, 111 F.3d 541, 543 (7th Cir. 1997); *United States* v. *Reider*, 103 F.3d 99, 101 (10th Cir. 1996); *United States* v. *Maddox*, 48 F.3d 555, 560 (D.C. Cir. 1995); *Minor* v. *Dugger*, 864 F.2d 124, 127 (11th Cir.

consequences, including an enhanced sentence for a future crime, was not sufficient to make Hohn's challenge to his Section 924(c)(1) conviction justiciable. The Court should summarily reverse the decision below.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE IMPLEMENTATION OF THE PRESUMPTION OF JUSTICIABILITY

Ever since its decision in *Pollard* v. *United States*, 352 U.S. 354 (1957), this Court has "abandoned all inquiry into the actual existence of specific collateral consequences and * * * presumed that they existed" whenever habeas petitioners challenge the validity of their criminal convictions. *Sibron*, 392 U.S. at 55. In this case, the Eighth Circuit flatly disregarded that presumption of justiciability by ignoring the representations by both parties that the case was not moot and by undertaking itself (without briefing, argument, or other guidance from the parties) to defeat jurisdiction. Although the Eighth Circuit's approach is demonstrably contrary to this Court's precedent, its confusion is emblematic of the broader uncertainty among the courts of appeals as to how to implement the presumption of justiciability.

The Court should grant certiorari in this case to resolve the conflict among the circuits concerning the implementation of the presumption of justiciability. The courts of appeals are hopelessly divided on this point, having devised four different approaches to implementing the presumption. Because this is

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1989); *Anderson* v. *Smith*, 751 F.2d 96, 100 n.3 (2d Cir. 1984); *United States* v. *Maldonado*, 735 F.2d 809, 813 (5th Cir. 1984).

an important and recurring issue of federal law that has fractured the courts of appeals, further review is necessary.

A. The Courts Of Appeals Are Sharply Divided As To How To Implement The Presumption Of Justiciability

There is a great deal of confusion among the courts of appeals regarding how the presumption of justiciability should be implemented. Currently, the courts of appeals take four different approaches when determining whether criminal conviction challenges are moot: (1) the Ninth Circuit applies an irrebuttable presumption that collateral consequences are present; (2) the Second, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits apply the presumption of collateral consequences, and either explicitly or implicitly place the burden of rebutting the presumption on the government; (3) the First, Third, and Fourth Circuits place the burden of proving possible collateral consequences on the petitioner; and (4) the Eighth Circuit stands alone in holding that a court may *sua sponte* disregard the presumption, even where the parties are in agreement that the case is not moot. The Court should therefore grant certiorari in order to settle this important and frequently recurring question of federal law.

The *Sibron* Court stated that, in the context of challenges to criminal convictions, a case is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction," 392 U.S. at 57, and explained that the Court has "abandoned all inquiry into the actual existence of specific collateral consequences and * * * presumed that they existed." *Id.* at 55. Although this practice of presuming jurisdiction in the context of challenges to criminal convictions differs from the otherwise-applicable rule that a party must demonstrate

sufficient facts to create jurisdiction in the federal courts, the Court has consistently applied the rule in *Sibron*. See, *e.g.*, *Spencer*, 523 U.S. at 10-12 (citing *Dickerson*, 508 U.S. 366); *Evitts*, 469 U.S. at 391 n.4; *Mimms*, 434 U.S. at 108 n.3; *Benton*, 395 U.S. at 790-791.

Lower federal courts, however, have been divided as to how to interpret these precedents. In cases involving challenges to criminal convictions, one circuit applies an irrebuttable presumption that collateral consequences are present, six circuits place the burden on the government to overcome the presumption by proving that there are no collateral consequences, three circuits place the burden on the petitioner to prove that there is at least a possibility of collateral consequences, and the Eighth Circuit stands alone in holding that a court may *sua sponte* disregard the presumption even after the government has conceded the presence of collateral consequences.

The Ninth Circuit, interpreting *Sibron* in light of Federal Sentencing Guidelines that inevitably use prior convictions to enhance criminal sentences, has held that the *Sibron* presumption is irrebuttable. *Chacon* v. *Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), superseded by statute on other grounds, as recognized in *Morris* v. *Woodford*, 229 F.3d 775, 779 (9th Cir. 2000). The Ninth Circuit has consistently followed *Chacon*. See *United States* v. *Palomba*, 182 F.3d 1121, 1123 n.3 (9th Cir. 1999); *Wood* v. *Hall*, 130 F.3d 373, 376 (9th Cir. 1997); *Larche* v. *Simons*, 53 F.3d 1068, 1070-1071 (9th Cir. 1995) (although there were no collateral consequences present, the case was not moot because *Chacon* had created an irrebuttable presumption). Thus, Hohn's claim would clearly be justiciable in the Ninth Circuit.

Six other circuits — the Second, Fifth, Sixth, Seventh, Tenth and Eleventh — have interpreted *Sibron* as creating a rebuttable presumption, placing the burden on the government to prove that there is no possibility of collateral consequences. See, *e.g.*, *United States* v. *Mercurris*, 192 F.3d 290, 293-294 (2d Cir. 1999); *United States* v. *Maldonado*, 735 F.2d 809, 813 (5th Cir. 1984); *Green* v. *Arn*, 839 F.2d 300, 301-302 (6th Cir. 1988); *Diaz* v. *Duckworth*, 143 F.3d 345, 345-346 (7th Cir. 1998); *D.S.A.* v. *Circuit Court Branch 1*, 942 F.2d 1143, 1146 n.3 (7th Cir. 1991); *Oyler* v. *Allenbrand*, 23 F.3d 292, 294 (10th Cir. 1994); *Malloy* v. *Purvis*, 681 F.2d 736, 739 (11th Cir. 1982). In all of these circuits, Hohn's claim would also be justiciable, as the United States made no attempt to meet its burden of demonstrating the absence of collateral consequences.[8]

Three circuits — the First, Third and Fourth — have not formally applied the presumption, instead placing the burden on the petitioner to demonstrate that there is at least a possibility of collateral consequences. See, *e.g.*, *Arnold* v. *Panora*, 593 F.2d 161, 163-164 (1st Cir. 1979); *Steele* v. *Blackman*, 236 F.3d 130, 134 n.4 (3d Cir. 2001) (finding case not to be moot because petitioner had demonstrated sufficient collateral consequences); *Kravitz* v. *Pennsylvania*, 546 F.2d 1100, 1102-1103 (3d Cir. 1977) (same); *Broughton* v. *North Carolina*, 717

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[8] Contrary to the Eighth Circuit's implication, this Court's decision in *Spencer* did not alter the implementation of the presumption in any way. Thus, each of these courts to have considered the issue following *Spencer* has reaffirmed its prior precedent. See, *e.g.*, *Mercurris*, 192 F.3d at 293-294; *Diaz*, 143 F.3d at 345-346.

F.2d 147, 149 (4th Cir. 1983).[9] Even in these three circuits, Hohn's claim would be justiciable. Hohn could have met his burden of proving justiciability either by pointing to the government's concession that jurisdiction was present, or by pointing to the collateral consequences that are present in this case (such as the mandatory statutory enhancement for recidivist offenders under Section 924(c)).

The Eighth Circuit alone has taken the position that a court may *sua sponte* overcome the presumption, even where the government has conceded that the case is not moot. Only under the Eighth Circuit's approach, which (1) disregarded the presumption of justiciability, (2) ignored the government's concession that the case was not moot, and (3) rejected future sentence enhancements as collateral consequences, could this case possibly be dismissed as moot.

The Eighth Circuit purported to begin its jurisdictional analysis "by presuming that Hohn's § 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable." App., *infra*, 10a. But it then proceed to find that the presumption had been overcome (*id.* at 13a) on the basis that it "simply cannot think of any concrete statutory collateral consequence stemming from Hohn's § 924(c)(1) conviction."[10]

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[9] The D.C. Circuit appears to vacillate between the second and third approaches to implementing the presumption. Compare *Otey* v. *United States*, 417 F.2d 559, 561 n.10 (D.C. Cir. 1969) (failing to apply the presumption in a challenge to a criminal conviction) with *United States* v. *Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994) (challenge to a criminal sentence was justiciable because the government had failed to meet its burden of showing a lack of collateral consequences).

[10] The phrasing of the Eighth Circuit's conclusion further evidences its hostility to implementing the presumption of justiciability. The Eighth Circuit was willing to find jurisdiction only if it could "think of any concrete statutory collateral consequence." App., *infra*, 13a. That statement

The Eighth Circuit's approach to implementing the presumption completely misses the point. Whether or not the court could think of a collateral consequence (without asking the parties for assistance) is of no consequence, because, as this Court just explained in *Spencer*, "we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences." 523 U.S. at 8. To find that a presumption has been "overcome[]" (App., *infra*, 13a) because of an inability to think of evidence in support of the fact one is supposed to be presuming is to accord absolutely no weight to the presumption. The Eighth Circuit's approach is therefore fundamentally inconsistent with governing law.

Over thirty years have passed since *Sibron*, and the confusion among the lower federal courts has progressively become more entrenched. Every one of the courts of appeals with jurisdiction over criminal cases has taken a position in the split, and nothing can be gained from further percolation of the issue. The Court should act now to end the four-way circuit split, and to provide clear guidance as to how courts should implement the presumption that criminal conviction challenges are justiciable.

B. The Implementation Of The Presumption Of Justiciability Is An Important And Recurring Issue

The issue of subject matter jurisdiction under Article III is present in every case proceeding through the federal courts. The presumption of justiciability arises in every habeas petition presenting a challenge to a criminal conviction after the petitioner has been released from confinement. There have

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flagrantly disregards this Court's instruction that courts are required "to count collateral consequences that are remote and unlikely to occur." *Spencer*, 523 U.S. at 8.

been hundreds of cases presenting the issue of the presumption of justiciability since this Court's decision in *Sibron*, although many of the decisions have been unpublished. The issue can be expected to arise with similar frequency in the future.

It is also unquestionably an important issue of federal law. The jurisdiction of the federal courts is always significant, but the issue presented in this case is particularly crucial, because it determines whether actually innocent habeas petitioners like Hohn will be provided a forum in which to free themselves from the collateral consequences resulting from unconstitutional criminal convictions.

The Eighth Circuit appeared to view the presumption as optional (see App., *infra*, 10a ("a court ***may*** presume collateral consequences in the context of a criminal conviction") (emphasis added)) based on its assumption that Hohn could always challenge his unconstitutional Section 924(c) conviction at a later date in the event that he is ever actually subject to an enhanced sentence as a result of the conviction. The Eighth Circuit's approach of denying actually innocent petitioners like Hohn access to the federal courts is indefensible as a matter of law and policy, for two reasons.

First, the Eighth Circuit imposes an unacceptable burden on habeas petitioners by assuming that their actual innocence will be just as easy to prove at some later date. As the *Sibron* Court recognized:

> The question of the validity of a criminal conviction can arise in many contexts, and the sooner the issue is fully litigated the better for all concerned. It is ***always*** preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover,

> litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a ***potential*** legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action.

392 U.S. at 56-57 (emphasis added) (citation omitted). It is grossly unfair not to allow petitioners to bring habeas claims challenging wrongful convictions that inevitably bear collateral consequences until *after* the petitioners have suffered from the enhanced sentence and do not have the same evidentiary resources available with which to prove their actual innocence.

Second, the Eighth Circuit may well be wrong that delayed adjudication of actual innocence is even procedurally possible. In *Daniels*, this Court explored "whether * * * the individual who was sentenced may challenge his federal sentence though a motion under 28 U.S.C. § 2255 on the ground that his prior convictions were unconstitutionally obtained." 532 U.S. at 376. The Court held that "as a general rule, he may not," although "[t]here may be rare circumstances in which § 2255 would be available." *Ibid.* Thus, the rule imposed by the Eighth Circuit in this case seriously threatens to place habeas petitioners in a judicially devised Catch-22 in which the petitioners may ***never*** be able to obtain relief for unconstitutionally imposed convictions. Such a system cannot be reconciled with fundamental notions of due process.

Although the Eighth Circuit is unique in the extent to which it has departed from this Court's precedent in this area, the approach adopted by the First, Third and Fourth Circuits (and

occasionally by the D.C. Circuit) — in which the burden is placed on the petitioner to demonstrate collateral consequences — also plainly violates this Court's discussion in *Sibron* and can have the same adverse effects as the Eighth Circuit's approach. Many petitioners, as was the case with Hohn when he initiated his challenge to his Section 924(c) conviction, are unrepresented by counsel, and are required to proceed *pro se*. The complex area of habeas corpus presents many challenges for *pro se* petitioners, and adding the requirement of alleging collateral consequences will result in many petitions being dismissed on mootness grounds, denying petitioners any opportunity to challenge their convictions. This deprivation is all the more inappropriate because this Court's practice of presuming collateral consequences should — at a minimum — operate to remove this procedural hurdle.

This case presents a perfect example of the problems inherent in the diverse approaches adopted by the courts of appeals. Arnold Hohn has unconstitutionally served every day of a five-year prison sentence for a federal crime of which he was actually innocent. Ignoring the representation of the United States to the contrary, the Eighth Circuit *sua sponte* held that — until Hohn spends ***even more time*** in prison as a direct result of his unconstitutional conviction — his case is not important enough for a federal court to hear. Further review is warranted here.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted.

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MARCH 5, 2002

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

Arnold Frank HOHN, Appellant,

v.

UNITED STATES of America, Appellee,

No. 00-3327

Submitted: June 14, 2001
Filed: Aug. 22, 2001.
Rehearing and Rehearing
En Banc Denied Dec. 5, 2001*

Before WOLLMAN, Chief Judge, MAGILL, and HAMILTON,* Circuit Judges.

MAGILL, Circuit Judge.

Arnold F. Hohn appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence for using or carrying a firearm during and in relation to a drug trafficking crime under 18 U.S.C. § 924(c)(1). We hold that we do not have jurisdiction to hear Hohn's appeal, and thus vacate the judgment and remand to the district court to dismiss the motion as moot.

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* Judge Loken, Judge Bye, and Judge William Jay Riley would grant the petition.

* The Honorable Clyde H. Hamilton, United States Circuit Judge for the Fourth Circuit, sitting by designation.

I.

In June 1990, police searched Hohn's home after an informant claimed that Hohn was selling methamphetamine. Police arrested Hohn, the only person present at the time of the search, in his living room. He neither was carrying a firearm on his person, nor did police find any weapons in the living room. On Hohn's kitchen counter, police discovered methamphetamine, three firearms, and two holsters. Police also found two firearms in a box in Hohn's kitchen. In Hohn's bedroom, police found more methamphetamine, as well as another firearm and holster nearby. In a second bedroom, police observed a wall-mounted gun case containing a collection of hunting rifles and shotguns.

In wake of the search of Hohn's home, the government charged Hohn with: (1) possession of methamphetamine with intent to distribute within 1000 feet of a school, in violation of 21 U.S.C. §§ 841(a) and 845a (recodified at 21 U.S.C. § 860); (2) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(a)(2); and (3) using or carrying a firearm during and in relation to a drug trafficking crime, in violation of § 924(c)(1).[1] At trial, Hohn testified in his own behalf, admitting possession of methamphetamine and firearms, but claiming that he owned the weapons because he is an avid hunter and because his home had been burglarized and vandalized repeatedly. No witness testified to seeing Hohn use or carry a firearm during and in relation to any drug activity.

At the close of the trial, the district court provided the jury with the following instruction on the meaning of "use" and "carry" in § 924(c)(1):

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[1] In 1998, Congress amended § 924(c)(1) to proscribe possession of a firearm in furtherance of a drug trafficking crime, in addition to proscribing using or carrying a firearm during and in relation to a drug trafficking crime. Act of Nov. 13, 1998, Pub. L. 105-386, § 1(a), 112 Stat. 3469; 18 U.S.C. § 924(c)(1) (2000). Hohn's appeal requires us to examine the pre-1998 statute.

> The phrase 'used a firearm' means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase 'carried a firearm' does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

The court overruled Hohn's objection that the instruction "allows this jury to find that merely having a firearm available is sufficient" to convict under the "use" prong of § 924(c)(1).

The jury found Hohn guilty of all counts, and the district court sentenced him to ninety months imprisonment, with sixty months of the sentence issued for the § 924(c)(1) conviction. The court also imposed a six-year term of supervised release for the §§ 841(a) and 845a violation, and three-year terms of supervised release for the remaining two counts, both running concurrently to the six-year term.

Hohn's rather mundane criminal conviction has sparked a judicial odyssey that has lasted over a decade and has resulted in three prior opinions of this court and a trip to the United States Supreme Court. We turn now to sketch Mr. Hohn's long quest to reverse his § 924(c)(1) conviction.

On direct appeal, Hohn did not challenge his § 924(c)(1) conviction or the jury instructions related to that offense, probably because of this court's broad interpretation of the word "use" at the time of his appeal. *See, e.g., United States v. LaGuardia,* 774 F.2d 317, 321 (8th Cir. 1985) (holding that a firearm's "presence and availability in light of the evident need" demonstrate "use"). This court affirmed Hohn's convictions. *United States v. Hohn,* 8 F.3d 1301, 1307 (8th Cir. 1993).

Subsequently, the Supreme Court effectively abrogated this court's interpretation of the word "use" when it concluded that § 924(c)(1) requires "active employment of the firearm" for conviction under the "use" prong. *Bailey v. United States*, 516 U.S. 137 (1995). Relying on *Bailey,* Hohn filed a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Hohn argued that his conduct did not amount to a violation of § 924(c)(1), as interpreted by *Bailey,* and that the district court's jury instructions improperly defined the phrase "used a firearm." The district court denied his motion, concluding that Hohn waived his claim by failing to challenge his § 924(c)(1) conviction or the corresponding jury instructions on direct appeal. This court denied Hohn a certificate of appealability, concluding that his claim is statutorily based and thus fails to make "'a substantial showing of the denial of a constitutional right.'" *Hohn v. United States,* 99 F.3d 892, 892-93 (8th Cir. 1996) (quoting 28 U.S.C. § 2253(c)(2)), *vacated,* 524 U.S. 236 (1998). The Supreme Court granted certiorari to determine whether it has jurisdiction to review federal circuit court decisions denying applications for certificates of appealability. 524 U.S. at 238-39. Answering this question affirmatively, the Court vacated our denial of a certificate of appealability because the government conceded that Hohn's claim is constitutional in nature, and remanded to this court for further consideration. *Id.* at 253.

On remand, this court held Hohn actually innocent of "using" a firearm under § 924(c)(1). *Hohn v. United States,* 193 F.3d 921, 924 (8th Cir. 1999). However, noting that the jury also convicted Hohn under the "carry" prong, we remanded to the district court "to engage in the fact-bound analysis of whether Hohn is factually innocent of carrying a firearm during or in relation to a drug trafficking offense, in order to open the gateway for the consideration of his defaulted *Bailey* claim." *Id.*

The district court ordered supplemental briefing on whether Hohn is factually innocent of violating § 924(c)(1) under the

"carry" prong. The court held that Hohn did not establish actual innocence of "carrying" a firearm under § 924(c)(1), reasoning that

> the guns being open and obvious on the kitchen counter with such things as spare change next to holsters in which to carry them would indicate that they were carried. The evidence along with the drugs being found in the Defendant's home and on his person, could allow a reasonable juror to find that the Defendant carried the firearm in relation to a drug trafficking crime. In addition, this Court notes that an informant stated that the Defendant regularly carried a firearm.

The district court issued Hohn a certificate of appealability, and this appeal ensued. Hohn was released from prison in October 1997 and currently is serving his six-year term of supervised release. It is with this procedural scenario in mind that we hope finally to bring Mr. Hohn's odyssey to a conclusion.

II.

Before reaching the merits, we must determine whether we have jurisdiction to entertain Hohn's appeal notwithstanding his release from prison. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 73 (1997) ("[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction . . . .") (internal quotations and citations omitted). This is the case even though the government concedes that we have jurisdiction. *See Thomas v. Basham,* 931 F.2d 521, 523 (8th Cir. 1991). Although both this court and the Supreme Court have entertained Hohn's appeals since he was released from prison, neither court examined whether it had jurisdiction to reach the merits of the appeal. *Hohn,* 524 U.S. 236; *Hohn,* 193 F.3d 921. The Supreme Court has cautioned that "drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 91 (1998).

Under Article III, § 2 of the United States Constitution, "'the exercise of judicial power depends upon the existence of a case or controversy.'" *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974) (citation omitted). Regardless of whether an Article III, § 2 case existed in prior proceedings, Hohn must show the subsistence of a case or controversy in this court. *See Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477-78 (1990). Specifically, Hohn must show that his appeal is not moot despite his release from prison. Put another way, Hohn must show that the standing he had when he filed his § 2255 motion continues to exist now. *See United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980) (explaining that "mootness [is] 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'") (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When,* 82 Yale L.J. 1363, 1384 (1973)). Thus, Hohn must show that he has suffered, or is threatened with, an actual injury traceable to the government that is likely to be redressed by a favorable decision. *See Lewis,* 494 U.S. at 477.

We hold that we do not have jurisdiction to entertain Hohn's appeal under the general mootness inquiry. Hohn is no longer imprisoned. Hohn's three-year term of supervised release for his § 924(c)(1) conviction runs concurrent to the six-year term of supervised release stemming from his conviction under §§ 841(a) and 845a. Thus, even if we were to hold Hohn's § 924(c)(1) conviction unconstitutional, such a holding would not affect Hohn's term of supervised release.[2]

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[2] It is arguable that we should count Hohn's three-year term of supervised release resulting from his § 924(c)(1) conviction as beginning when he was released from prison in October 1997. If true, then this appeal comes in a different procedural posture from the 1998 and 1999 opinions issued by this court and the Supreme Court. Since this court's 1999 decision, Hohn has completed over three years of supervised release. Thus, it cannot be said that Hohn

Therefore, Hohn's case is moot under the general mootness inquiry because a favorable decision could not redress any injury caused by a purportedly unconstitutional conviction under § 924(c)(1).[3]

Our holding today compels us to revisit our decision in *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir. 1997). In *Sesler,* the defendant pleaded guilty to violating § 924(c)(1), and the district court sentenced him to sixty months of imprisonment followed by three years of supervised release. *Id.* at 570. Subsequently, Congress enacted a statute permitting the Bureau of Prisons (the "Bureau") to reduce the sentence of a prisoner who had committed a nonviolent offense by up to one year if

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currently is serving a term of supervised release resulting from his § 924(c)(1) conviction.

[3] Actually, Hohn's pro se § 2255 motion seeks to vacate, set aside, or correct his *sentence*. When a convict challenges his sentence, rather than the underlying conviction, the completion of the sentence renders the convict's motion moot. *Lane v. Williams*, 455 U.S. 624, 631 (1982). We interpret pro se habeas filings liberally. *Papantony v. Hedrick*, 215 F.3d 863, 865 (8th Cir. 2000). Although entitled "Federal Custody; remedies on motion attacking sentence," § 2255 is available to attack convictions as well. Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* 1461 (4th ed. 1996); *United States v. Angelos,* 763 F.2d 859, 860 (7th Cir. 1985) (Posner, J.) (holding that "if the defendant can show that under no possible view of his conduct was he guilty of a federal crime, the conviction will be set aside as 'otherwise subject to collateral attack' under 28 U.S.C. § 2255") (citing *Davis v. United States,* 417 U.S. 333, 345-46 (1974)). We think that by presenting a *Bailey* challenge, Hohn necessarily attacks his § 924(c)(1) conviction as well as his sentence. *Cf. Port v. Heard,* 764 F.2d 423, 427-28 (5th Cir. 1985). Moreover, given Hohn's explicit requests, in both his appellate briefs and his response to the government's answer to his § 2255 motion, that this court reverse or vacate his conviction, we interpret Hohn's § 2255 motion to encompass a challenge to his § 924(c)(1) conviction.

the prisoner successfully completed a substance abuse treatment program. 18 U.S.C. § 3621(e)(2)(B). Since he already had completed a drug abuse program, the defendant in *Sesler* petitioned the Bureau to reduce his sentence. 110 F.3d at 570. The Bureau denied the defendant's petition, concluding that he was ineligible for a sentence reduction under § 3621(e)(2)(B) because he had been convicted of a violent offense. *Id.* The defendant then filed a habeas petition, which the district court denied. *Id.* After the defendant filed his appeal of the district court's decision, he was released from prison and had begun serving his term of supervised release. *Id.* at 571.

This court held that the defendant's appeal presented a live case or controversy because, if the Bureau had reduced his sentence by one year, then the defendant's term of supervised release would have begun one year earlier. *Id.* Therefore, we reasoned, if the defendant was successful on the merits of his appeal, then his sentence could be reduced by one year. *Id. But see United States v. Douglas,* 88 F.3d 533, 534 (8th Cir. 1996) (per curiam) (holding that courts may not credit prison time served in excess of a defendant's revised sentence against the defendant's term of supervised release).

Under *Sesler,* if we vacated Hohn's § 924(c)(1) conviction, we would be able to reduce his term of supervised release by sixty months to account for the excess amount of time he spent in prison for the § 924(c)(1) conviction. However, since *Sesler*, the Supreme Court held in *United States v. Johnson,* 529 U.S. 53 (2000), that a court may not reduce a prisoner's term of supervised release to reflect an excess amount of time in prison. *Id.* at 60. Thus, *Sesler* and *Johnson* are in conflict. *See Crawford v. Booker,* No. 99-3121, 2000 WL 1179782, at *1-*2 (10th Cir. Aug. 21, 2000). A panel of this court ordinarily cannot overrule a prior panel opinion, but this rule does not apply when a decision of the Supreme Court casts doubt upon the prior panel opinion. *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 838 (8th Cir. 1997). The Supreme Court's

opinion in *Johnson* compels us to overrule *Sesler*. Under *Johnson*, we could not reduce Hohn's term of supervised release if we held his § 924(c)(1) conviction unconstitutional. Therefore, Hohn's case is moot under the general mootness inquiry because we are incapable of redressing his asserted injury.

Since Hohn is unable to show that his appeal presents a live case or controversy under the general mootness inquiry, he must show that an exception to the mootness doctrine applies to render his appeal justiciable. Even when a litigant is unable to meet the requirements of the general mootness inquiry, the litigant may invoke an exception to the mootness doctrine to gain judicial review. There are four exceptions to the mootness doctrine, so that a court will not dismiss a case as moot if: (1) secondary or "collateral" injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit. Erwin Chemerinsky, *Federal Jurisdiction* § 2.5.1, at 128 (3d ed. 1999), *Artway v. Attorney General of N.J.*, 81 F.3d 1235, 1246 n.6 (3d Cir. 1996). In this case, the government argues that sufficient collateral consequences flow from Hohn's conviction so that even though he already has been released from prison, we may entertain his appeal. Specifically, the government states: "A collateral consequence of Hohn's Section 924(c) conviction is an enhancement under Section 924(c) should Hohn in the future be convicted of a second or subsequent violation."[4]

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[4] The Supreme Court refers to collateral consequences as an exception to the mootness doctrine. However, one commentator has noted that a case that fits within the collateral consequences exception is not moot under the general mootness inquiry "because some injury remains that could be redressed by a favorable federal court decision." Chemerinsky, *supra*, § 2.5.2, at 130. We thus think that our holding that Hohn's appeal is moot under the general mootness

The Supreme Court has explained that "[a]n incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." *Spencer v. Kemna,* 523 U.S. 1, 7 (1998). However, after the convict's sentence expires, "some concrete and continuing injury other than the now-ended incarceration or parole — some 'collateral consequence' of the conviction — must exist if the suit is to be maintained." *Id.*

In *Spencer,* the Court held that insufficient collateral consequences resulted from the petitioner's parole revocation to avoid mootness. *Id.* at 14-17. In so holding, the Court criticized precedent that presumed the existence of collateral consequences and that accepted "the most generalized and hypothetical of consequences as sufficient to avoid mootness." *Id.* at 9-10 (citing *Pollard v. United States,* 352 U.S. 354 (1957), as "[t]he gateway to abandonment of [the previously] fastidious approach to collateral consequences"). Nevertheless, the *Spencer* Court did not overrule *Pollard* and its progeny, instead noting that although a court may presume collateral consequences in the context of a criminal conviction, the same cannot be said of parole revocation. 523 U.S. at 12.

Thus, we begin our analysis by presuming that Hohn's § 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable. However, a presumption is just that — it does not end our analysis. Moreover, we begin our analysis cognizant of the *Spencer* Court's distinct distaste for finding collateral consequences

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inquiry renders unnecessary an examination of whether his conviction creates sufficient collateral consequences to make his appeal justiciable. Nevertheless, we proceed to examine Hohn's appeal under the collateral consequences exception to the mootness doctrine.

without a showing of a concrete statutory disability stemming from the challenged conviction. We thus agree with then-Chief Judge Posner's observation that *Spencer*

> tries to bring the law of habeas corpus into conformity with a general 'hardening' of standing requirements in recent years. A basic principle of standing is that a person is not entitled to litigate in a federal court unless he can show a reasonable probability of obtaining a tangible benefit from winning. Certainty is not required but a remote possibility won't do.

Diaz v. Duckworth, 143 F.3d 345, 347 (7th Cir. 1998) (citations omitted).

The government contends that the possibility that a court could use Hohn's § 924(c)(1) conviction to enhance his sentence should a court convict Hohn of another crime in the future is a sufficient collateral consequence to render his appeal justiciable. We disagree. In *Spencer,* the habeas petitioner noted that a court could use the revocation of his parole to increase his sentence in a future sentencing proceeding. 523 U.S. at 15. The Court rejected this proposed collateral consequence, stating that "it was contingent upon respondents' violating the law, being caught and convicted. 'Respondents themselves are able — and indeed required by law — to prevent such a possibility from occurring.'" *Id.* (quoting *Lane v. Williams,* 455 U.S. 624, 632 n. 13 (1982)). Similarly, the government's proposed collateral consequence in this case is contingent upon Hohn committing another crime, something that is within his power to prevent from occurring.

Nor can we identify any concrete statutory collateral consequence stemming from Hohn's § 924(c)(1) conviction that we could redress by vacating the conviction. In addition to his § 924(c)(1) conviction, the jury found Hohn guilty of possessing methamphetamine with intent to distribute within 1000 feet of a public school and being a felon in possession of a firearm. Moreover, prior to this case, Hohn was convicted of

malicious destruction of property, for which he served one year of imprisonment. These other convictions independently cause Hohn the kinds of concrete disadvantages or disabilities that the Supreme Court has found constitute sufficiently adverse collateral consequences to render a case justiciable, "such as deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses." *Spencer,* 523 U.S. at 8 (citing *Carafas v. LaVallee,* 391 U.S. 234, 237 (1968) (finding sufficient collateral consequences when the conviction left the petitioner unable to engage in certain businesses, serve as a labor union official, vote in New York state elections, or serve as a juror); *Ginsberg v. New York,* 390 U.S. 629, 633 n.2 (1968) (finding sufficient collateral consequences when the conviction rendered the petitioner liable to revocation of his license to operate a luncheonette business); *United States v. Morgan,* 346 U.S. 502, 503-04, 512-13 (1954) (finding sufficient collateral consequences when the conviction had been used to increase the petitioner's current sentence under a state recidivist law); *Fiswick v. United States,* 329 U.S. 211, 221-23 (1946) (finding sufficient collateral consequences when the conviction rendered the petitioner liable to deportation and denial of naturalization, and ineligible to serve on a jury, vote, or hold office)).

We acknowledge that *Spencer,* although strongly critical of *Pollard* and its progeny, did not overrule this line of cases. 523 U.S. at 8-14. However, the *Pollard* line of cases did not examine whether the convictions at issue produced collateral consequences independent from any other convictions in the petitioners' records. We thus are hesitant to infer from this line of cases that, in conducting our collateral consequences analysis, we should examine only Hohn's § 924(c)(1) conviction without regard to his other convictions, *Cf. Steel Co.,* 523 U.S. at 91 (cautioning that "drive-by jurisdictional rulings . . . have no precedential effect").

Moreover, *Spencer* cited with approval Justice Harlan's concurrence in *Parker v. Ellis,* 362 U.S. 574 (1960) (per

curiam), *overruled by Carafas,* 391 U.S. 234. In *Parker,* Justice Harlan concluded that the petitioner's habeas filing was moot because he had numerous prior convictions, so that even if the Court held in the petitioner's favor on his current challenge, such a holding would not prevent any adverse consequence stemming from the petitioner's other convictions. *Id.* at 576 (Harlan, J., concurring). Justice Harlan's reasoning is equally applicable to the case here.

Even if we were to hold that Hohn is actually innocent of violating § 924(c)(1), the collateral consequences attendant to Hohn's other convictions would stand. We simply cannot think of any concrete statutory collateral consequence stemming from Hohn's § 924(c)(1) conviction that, given Hohn's numerous convictions, we would erase by vacating the § 924(c)(1) conviction. We conclude that our inability to redress the purported constitutional infirmity in Hohn's § 924(c)(1) conviction overcomes the presumption in favor of finding collateral consequences resulting from a criminal conviction. *See Parker,* 362 U.S. at 576 (Harlan, J., concurring). Therefore, Hohn's appeal is moot, and we do not have jurisdiction to address his contention that his § 924(c)(1) conviction is unconstitutional. *See Lowry v. McDonnell Douglas Corp.,* 211 F.3d 457, 464 (8th Cir.), *cert. denied,* 531 U.S. 929 (2000) (holding that the lack of jurisdiction prevented addressing the merits of the appeal since such a discussion "could only be an advisory opinion").

III.

Since we do not have jurisdiction to hear Hohn's appeal, we VACATE the judgment and REMAND to the district court to dismiss the motion as moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,

v.

ARNOLD F. HOHN, Defendant.

No. 8:90CR93

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Eighth Circuit Court of Appeals' remand (filing 212) of the Defendant's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence (filing 175). After careful consideration of the motion, briefs, and the case law, the Court finds that the motion should be denied.

BACKGROUND

The Defendant was charged in a three count indictment on August 24, 1990 for possession with intent to distribute methamphetamine within 1000 feet of real property compromising a public school in violation of 21 U.S.C. § 845a; use of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and 924(a)(2). The Defendant was found guilty on all counts and sentenced in July 1992 to 90 months imprisonment and six years of supervised release. The Defendant appealed his conviction claiming this Court erred by denying a motion to dismiss on Speedy Trial grounds, by denying a motion to suppress evidence, and by denying a motion to dismiss Count I of the indictment. The Eighth Circuit affirmed the Defendant's conviction in *United States v. Hohn*, 8 F.3d 1301 (8th Cir. 1993).

On January 24, 1996, the Defendant filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on the basis of the Supreme Court's decision in the case of *Bailey v. United States*, 516 U.S. 137 (1995) which abrogated the interpretation of the term "use" of a firearm in 18 U.S.C. § 924(c). This Court denied the motion on July 18, 1996 finding that the Plaintiff's claim was waived since he had not raised it in his direct appeal. The Eighth Circuit subsequently denied the Defendant's certificate of appealability but the United States Supreme Court remanded the case for further consideration. *Hohn v. United States*, 524 U.S. 236 (1998).

Upon remand, the Eighth Circuit stated that the Defendant's "failure to raise the *Bailey* issue was a procedural default," but stated that it could be excused "'if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent.'" *Hohn v. United States*, 193 F.3d 921, 922 (8th Cir. 1999) (quoting *Bousley v. United States*, 118 S. Ct. 1604, 1611 (1998)). The court went on to say that the Defendant is claiming he is actually innocent and that he "'must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" *Id.* Finally, the court found that there was no evidence that the Defendant had "used" a firearm as defined in *Bailey*, but indicated that this Court must consider whether a reasonable juror could have convicted the Defendant for "carrying" a firearm pursuant to 18 U.S.C. § 924(c). Consequently, the court reversed and remanded this Court's decision on the Defendant's motion pursuant to § 2255 with directions "for a determination of whether Hohn has demonstrated a 'gateway' factual innocence claim." *Hohn v. United States*, 193 F.3d at 922.

ANALYSIS

The term "carries" as used within 18 U.S.C. § 924(c) has been interpreted by the United States Supreme Court and the

Eighth Circuit as including a type of personal transportation or conveyance of a firearm either on one's person or in his/her vehicle. *Muscarello v. United States*, 524 U.S. 125, 128-37 (1998); *United States v. McKinney*, 120 F.3d 132, 133-34 (8th Cir. 1997); *United States v. White*, 81 F.3d 80, 83 (8th Cir. 1996). Unlike some of the cases where a Defendant is found with the firearm on his/her person or in his/her vehicle, the Defendant in the present case was arrested in his living room with the weapons being found in the kitchen and bedroom. The Defendant argues that he had come home from work and running various errands when the police conducted a no-knock search warrant. The Defendant maintains that the weapons were not placed by him on the counter or carried by him in relation to a drug-trafficking crime. Furthermore, the Defendant points out that no trial testimony was offered indicating that a buyer ever saw him with a firearm. Thus, the Defendant seeks to have his conviction pursuant to 18 U.S.C. § 924(c) vacated. The Government contends that the Defendant had carried the firearms on his person by means of a holster under his clothing and that he had merely taken them off of his person, placed them and other items on the counter, and entered another room before the police entered. In addition, the Government directs this Court to testimony offered at the suppression hearing in which an officer stated he was informed that the Defendant always carried a firearm with him.

In *Bousley v. United States*, 118 S. Ct. 1604, 1611-12 (1998), the Court stated that "the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before our decision in *Bailey*." Thus, the Government places great weight on the testimony at the suppression hearing and what a reasonable jury would find. This Court finds that the firearm in question was not merely being stored in the house and that

its presence is not the basis for the conviction. Rather, the guns being open and obvious on the kitchen counter with such things as spare change next to holsters in which to carry them would indicate that they were carried. This evidence along with drugs being found in the Defendant's home and on his person, could allow a reasonable juror to find that the Defendant carried the firearm in relation to a drug trafficking crime. In addition, this Court notes that an informant stated that the Defendant regularly carried a firearm. It would seem inappropriate based on the evidence to say that the Defendant did not carry a firearm merely because he was in the other room when the police entered. As indicated above, a reasonable juror could have convicted the Defendant for "carrying" a firearm pursuant to 18 U.S.C. § 924(c) based on the evidence and inference of the events a minute before the police entered. As a result, this Court finds that the Defendant can not establish actual innocence of the crime charged and his motion pursuant to § 2255 should be denied.

IT IS ORDERED:

1. The Defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175) is denied; and

2. This matter is hereby dismissed.

DATED this 26 day of June, 2000.

BY THE COURT

/s/ WIILLIAM G. CAMBRIDGE
United States District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FRANK HOHN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 00-3327

Order Denying Petition for Rehearing and
for Rehearing En Banc

The petition for rehearing en banc is denied. Judge Loken, Judge Bye, and Judge William Jay Riley would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

December 5, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JUN 12 2002

(2)

No. 01-1340

In the Supreme Court of the United States

ARNOLD FRANK HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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2518

QUESTION PRESENTED

Whether petitioner's motion pursuant to 28 U.S.C. 2255 to vacate his conviction and sentence under 18 U.S.C. 924(c) is moot because petitioner has completed serving his term of imprisonment and supervised release on that conviction.

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In the Supreme Court of the United States

No. 01-1340

ARNOLD FRANK HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 262 F.3d 811.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2001. A petition for rehearing was denied on December 5, 2001 (Pet. App. 18a). The petition for a writ of certiorari was filed on March 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was

convicted of possession of methamphetamine with intent to distribute it within 1000 feet of a school, in violation of 21 U.S.C. 841 and 845a (recodified at 21 U.S.C. 860); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 90 months of imprisonment, to be followed by six years of supervised release, and he was ordered to pay $150 in special assessments. The court of appeals affirmed petitioner's convictions and sentence. The district court thereafter denied petitioner's motion for relief under 28 U.S.C. 2255, and the court of appeals rejected his request for a certificate of appealability. This Court granted certiorari, vacated the court of appeals' judgment, and remanded the case for further proceedings. On remand, the district court again denied petitioner's Section 2255 motion, and the court of appeals ordered the motion dismissed as moot.

1. In June 1990, the police searched petitioner's home after an informant told them that petitioner was selling methamphetamine. The police arrested petitioner, the only person present at the time of the search, in his living room. The police found methamphetamine, three firearms, and two holsters on petitioner's kitchen counter, and two more firearms in a box located in the kitchen. In petitioner's bedroom, they found more methamphetamine, as well as another firearm and a holster nearby. In a second bedroom, the police observed a wall-mounted gun case containing a collection of hunting rifles and shotguns. Pet. App. 2a.

2. A federal grand jury returned an indictment charging petitioner with: (1) possession of methamphetamine with intent to distribute it within 1000 feet of a school, in violation of 21 U.S.C. 841(a) and 845a

(recodified at Section 860); (2) being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) and 924(a)(2); and (3) using or carrying a firearm during and in relation to a drug trafficking crime, in violation of Section 924(c)(1).[1] Pet. App. 2a. At trial, petitioner testified in his own behalf. He admitted possessing methamphetamine and firearms, but he claimed that he owned the weapons because he is an avid hunter and because his home had been burglarized and vandalized. *Ibid.* At the close of the trial, the district court provided the jury with the following instruction on the meaning of "use" and "carry" in Section 924(c)(1):

> The phrase 'used a firearm' means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase 'carried a firearm' does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

Id. at 2a-3a. The court overruled petitioner's objection that the instruction "allows this jury to find that merely having a firearm available is sufficient" to establish "use" under Section 924(c)(1). *Id.* at 3a.

The jury found petitioner guilty on all counts, and the district court sentenced him to 90 months of imprison-

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[1] In 1998, Congress amended Section 924(c)(1) to proscribe possession of a firearm in furtherance of a drug trafficking crime, in addition to proscribing using or carrying a firearm during and in relation to a drug trafficking crime. Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469; 18 U.S.C. 924(c)(1) (2000). The petition involves only the pre-1998 statute.

ment, 60 months of which is attributable to the Section 924(c)(1) conviction. The court also imposed a six-year term of supervised release for the violation of Sections 841(a) and 845a, and concurrent three-year terms of supervised release for the remaining two counts. Pet. App. 3a. In addition, the district court imposed a special assessment of $50 on each of the three counts, see Judgment 5; Dist. Ct. Docket Entry 158, and defendant paid the special assessments as ordered. See Federal Bureau of Prisons, U.S. Dep't of Justice, *Progress Report for Arnold F. Hohn* (1995). On direct appeal, petitioner did not challenge his Section 924(c)(1) conviction or the jury instructions related to that offense. Pet. App. 3a. The court of appeals affirmed petitioner's convictions and sentence. *United States* v. *Hohn*, 8 F.3d 1301 (8th Cir. 1993).

3. Subsequently, this Court rejected the broad interpretation of the word "use" that formed the basis for the jury instructions at petitioner's trial and held that "use" under Section 924(c)(1) requires "active employment of the firearm." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Relying on *Bailey*, petitioner filed a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 4a. Petitioner argued that his conduct did not constitute a violation of Section 924(c)(1), as interpreted by *Bailey*, and that the district court's jury instructions improperly defined the phrase "used a firearm." The district court denied the motion, concluding that petitioner had waived the *Bailey* claim by failing to challenge his Section 924(c)(1) conviction or the corresponding jury instructions on direct appeal. *Ibid.* The court of appeals denied petitioner a certificate of appealability on the ground that his claim is statutory rather than constitutional and he thus had not made "a substantial

showing of the denial of a constitutional right." *Hohn* v. *United States*, 99 F.3d 892, 892-893 (8th Cir. 1996) (quoting 28 U.S.C. 2253(c)(2)), vacated, 524 U.S. 236 (1998).

4. This Court granted certiorari to determine whether it has jurisdiction to review decisions by the courts of appeals denying applications for certificates of appealability. 524 U.S. at 238-239. After answering that question in the affirmative, the Court vacated the court of appeals' decision because the United States conceded that petitioner's *Bailey* claim is constitutional in nature. *Id.* at 240, 253. The Court remanded the case to the court of appeals for further consideration. *Id.* at 253.

5. On remand, the court of appeals considered whether it could grant petitioner relief on his *Bailey* claim notwithstanding that he had procedurally defaulted the claim by failing to raise it on direct appeal. *Hohn* v. *United States*, 193 F.3d 921, 923-925 (8th Cir. 1999). Petitioner contended that his procedural default should be excused because he was actually innocent of the Section 924(c) offense. *Id.* at 923. The court of appeals held that petitioner was "actually innocent" of "using" a firearm under Section 924(c)(1). *Id.* at 924. Noting, however, that the jury found petitioner guilty of using *or* carrying a firearm, the court of appeals remanded to the district court "to engage in the fact-bound analysis of whether [petitioner] is factually innocent of carrying a firearm during or in relation to a drug trafficking offense, in order to open the gateway for the consideration of his defaulted *Bailey* claim." *Ibid.* See *Bousley* v. *United States*, 523 U.S. 614 (1998). After consideration of the supplemental briefs submitted on that question, the district court held that petitioner did not establish actual innocence of "carry-

ing" a firearm under Section 924(c)(1). Pet. App. 14a-17a. The court reasoned that

> the guns being open and obvious on the kitchen counter with such things as spare change next to holsters in which to carry them would indicate that they were carried. This evidence along with drugs being found in [petitioner's] home and on his person, could allow a reasonable juror to find that [petitioner] carried the firearm in relation to a drug trafficking crime. In addition, this Court notes that an informant stated that [petitioner] regularly carried a firearm.

Id. at 17a. The district court granted petitioner's request for a certificate of appealability. See *id.* at 5a.

6. Acting on its own motion, the court of appeals determined that it lacked jurisdiction to entertain petitioner's appeal, vacated the district court's judgment, and ordered petitioner's Section 2255 motion to be dismissed as moot. Pet. App. 1a-13a. After acknowledging that "this court and the Supreme Court have entertained [petitioner's] appeals since he was released from prison [in October of 1997]," the court observed that it was nevertheless obligated to satisfy itself of its own jurisdiction. *Id.* at 5a. The court asserted that, "[r]egardless of whether an Article III, [Section] 2 case existed in prior proceedings, [petitioner] must show the subsistence of a case or controversy in this court." *Id.* at 6a. Then, after observing that petitioner is no longer imprisoned and that the concurrent three-year term of supervised release imposed on the Section 924(c) conviction has expired, the court concluded that "[petitioner's] case is moot under the general mootness inquiry because a favorable decision could not redress any injury caused by a purportedly unconstitutional

conviction under [Section] 924(c)(1)." *Id.* at 6a-7a & n.2.[2]

The court of appeals recognized, however, the existence of an "exception" to the mootness doctrine when an injury other than imprisonment or supervised release—"some 'collateral consequence' of the conviction"—continues to exist. Pet. App. 10a (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998)). Relying on *Pollard* v. *United States*, 352 U.S. 354 (1957), the court began its "collateral consequences" analysis "by presuming that [petitioner's] [Section] 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable." Pet. App. 10a. The court also noted, however, that, in *Spencer*, this Court declined to

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[2] The court acknowledged that, under its decision in *Sesler* v. *Pitzer*, 110 F.3d 569 (8th Cir. 1997), this case would not be moot because, if petitioner prevailed in his challenge to his Section 924(c) conviction and had thus served sixty months' excess time in prison, the court could reduce his term of supervised release by that period. Pet. App. 7a-8a. (Petitioner is still serving the six-year term of supervised release for his violation of 21 U.S.C. 841 and 845a. Pet. App. 6a.) But the court recognized that *Sesler* conflicts with this Court's holding in *United States* v. *Johnson*, 529 U.S. 53 (2000), that a court may not automatically credit excess prison time against a term of supervised release. The court thus held that it "could not reduce [petitioner's] term of supervised release if we held his § 924(c)(1) conviction unconstitutional." Pet. App. 9a. In *Johnson*, the Court also noted that a district court has power to take into account "equitable considerations of great weight [that] exist when an individual is incarcerated beyond the proper expiration of his prison term," by granting early termination of supervised release under 18 U.S.C. 3583(e)(1) and (2). *Johnson*, 529 U.S. at 60. The court of appeals in this case did not address whether the district court's power to shorten petitioner's supervised release based in part on a successful challenge to his Section 924(c) conviction might create a live controversy over the validity of that conviction.

extend the presumption of collateral consequences from criminal convictions to parole revocations and, in so doing, criticized its precedent that had presumed collateral consequences from convictions. *Ibid.* The court of appeals therefore concluded that its analysis should reflect "the *Spencer* Court's distinct distaste for finding collateral consequences without a showing of a concrete statutory disability stemming from the challenged conviction." *Id.* at 10a-11a.

Relying on *Spencer*, the court of appeals then rejected the government's position that "the possibility that a court could use [petitioner's] [Section] 924(c)(1) conviction to enhance his sentence should a court convict [petitioner] of another crime in the future is a sufficient collateral consequence to render his appeal justiciable." Pet. App. 11a; see Gov't C.A. Br. 9 n.1. The court of appeals reasoned that this collateral consequence is too remote to preclude dismissal for mootness because it is "contingent upon [petitioner's] committing another crime, something that is within his power to prevent from occurring." Pet. App. 11a (citing *Spencer*, 523 U.S. at 15).

Next, the court of appeals concluded that petitioner would not suffer any "concrete" collateral consequences —*e.g.*, deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses—as a result of his Section 924(c) conviction that would not independently result from his other, unchallenged convictions. Pet. App. 11a-12a. The court reasoned that its "inability to redress the purported constitutional infirmity in [petitioner's] [Section] 924(c)(1) conviction overcomes the presumption in favor of finding collateral consequences." *Id.* at 13a. The court therefore vacated

the district court's judgment on the merits and remanded the case for dismissal. *Ibid.*[3]

DISCUSSION

Petitioner argues (Pet. 8) that the court of appeals' decision "contravened decades of this Court's precedents by holding that the possibility that [petitioner's] Section 924(c) conviction would be used to enhance his sentence for future offenses was not a sufficient collateral consequence to make his case justiciable." He also contends that the courts of appeals are in conflict on how to apply the presumption of collateral consequences of a criminal conviction under this Court's cases. Although the government agrees that the Eighth Circuit's decision departs from this Court's cases, plenary review is not warranted because petitioner can show a concrete consequence of his conviction even under the court of appeals' test. The petition should therefore be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration.

1. The United States agrees that the court of appeals' decision conflicts with decisions of this Court finding challenges to criminal convictions, the sentence for which was fully served, not to be moot. *E.g.*, *Pollard* v. *United States*, 352 U.S. 354, 358 (1957); *Sibron* v. *New York*, 392 U.S. 40, 55-56 (1968); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985). At least since its decision in *Pollard*, the Court has viewed "[t]he

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[3] Petitioner sought rehearing and rehearing en banc. In response, the United States agreed with the panel that the case is moot because petitioner has served his full terms of imprisonment and supervised release on the Section 924(c) count. U.S. Resp. to Appellant's Pet. for Rehearing With Suggestion of Rehearing En Banc 9.

possibility of consequences collateral to the imposition of sentence [as] sufficiently substantial to justify * * * dealing with the merits" of a defendant's request for collateral relief. 352 U.S. at 358. In *Sibron*, the Court stated that it had "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." 392 U.S. at 55. Thereafter, the Court has "accept[ed] the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to conviction." *Spencer* v. *Kemna*, 523 U.S. 1, 10 (1998) (citing *Evitts*, 469 U.S. at 391 n.4; *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977) (per curiam); *Minnesota* v. *Dickerson*, 508 U.S. 366 (1993)). Notably, the Court has consistently relied on the possibility that the conviction might be used to enhance the defendant's sentence for a future conviction as a basis for finding that a controversy over the conviction's validity is not moot. See, *e.g.*, *Dickerson*, 508 U.S. at 371 n.2; *Evitts*, 469 U.S. at 391 n.4; *Mimms*, 434 U.S. at 108 n.3; *Benton*, 395 U.S. at 790; *Sibron*, 392 U.S. at 55-56.

The court of appeals began its analysis by citing *Pollard* and "presuming that [petitioner's] § 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable." Pet. App. 10a. But it then went on to analyze whether the presumption was overcome in light of the "*Spencer* Court's distinct distaste for finding collateral consequences without a showing of a concrete statutory disability stemming from the challenged conviction." *Id.* at 10a-11a. *Spencer*, however, did not involve a challenge to a conviction, and it did not alter the presumption, repeatedly applied by this Court, that "a wrongful criminal conviction has continuing collateral consequences."

Spencer, 523 U.S. at 8. Although some language in *Spencer* is critical of that presumption, see *id.* at 10-11, the Court did not abrogate the practice. See *id.* at 12. Instead, the Court declined to extend the presumption of collateral consequences to challenges to revocation of parole, a context in which the Court had not historically applied the presumption. See *id.* at 12-13 (citing *Lane* v. *Williams*, 455 U.S. 624 (1982)). In fact, the Court noted that the presumption of collateral consequences "is likely to comport with reality" in the context of criminal convictions, because "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.* at 12 (quoting *Sibron*, 392 U.S. at 55).

The presumption of collateral consequences in challenges to convictions thus survives *Spencer*. *Spencer* and other cases are not entirely clear on whether the presumption is effectively conclusive or, rather, whether it is rebuttable on a case-by-case basis. But the Court's cases *are* clear that the possibility of a recidivist enhancement for a future sentence is sufficient to preclude a finding of mootness in a challenge to a conviction. See *Dickerson*, *Evitts*, *Mimms*, *Benton*, and *Sibron*, *supra*. The court of appeals' rejection of that approach cannot be reconciled with those cases. And the court was not justified in departing from this Court's holdings based on a belief that their reasoning had been undermined by later decisions. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

2. Even if the analysis in *Spencer* were thought to justify revisiting the presumption that criminal convictions have collateral consequences, this case is not an appropriate one for undertaking that reconsideration.

That is because the decision of the court of appeals is incorrect even under that court's understanding of the law.

Even assuming that the law required a defendant who is no longer in custody or under supervised release for the conviction that he seeks to challenge to show a concrete consequence caused by the challenged conviction, there is a concrete consequence here. Pursuant to 18 U.S.C. 3013(a)(2)(A) (1988), the district court imposed a special assessment of $50 for petitioner's Section 924(c) conviction, see Judgment 5; Dist. Ct. Docket Entry 158, and petitioner paid the special assessment as ordered. See Federal Bureau of Prisons, U.S. Dep't of Justice, *Progress Report for Arnold F. Hohn* (1995). Petitioner's liability for the assessment depends on the validity of his Section 924(c) conviction, and it does not depend in any way on his other convictions. Cf. *Ray* v. *United States*, 481 U.S. 736 (1987) (per curiam) (sentence not concurrent when special assessment imposed on each count); see, *e.g.*, *United States* v. *Hughey*, 147 F.3d 423, 433 n.5 (5th Cir.) (ordering refund of assessment on vacated conviction), cert. denied, 525 U.S. 1030 (1998); *United States* v. *Rosario*, 111 F.3d 293, 300 (2d Cir.) (same), cert. denied, 522 U.S. 923, 522 U.S. 969 (1997). Thus, petitioner's challenge to his conviction would not be moot even if there were no presumption of collateral consequences, and, in particular, even if the possibility of a future recidivist enhancement did not suffice to establish a live controversy. Cf. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 463 n.5 (1997) (challenge to terminated regulation not moot in light of plaintiffs' prayer for refund of assessments paid before termination).

Neither party called the special assessment on the Section 924(c) count to the attention of the court of

appeals. That court thus has not had the opportunity to consider the effect of the assessment on its analysis of the mootness issue. If, on remand, the court of appeals agrees that petitioner's motion is not moot because of the special assessment, then the court of appeals may choose not to address the general mootness question discussed in its initial opinion in this case. The court could instead proceed to determine whether the district court correctly denied petitioner's Section 2255 motion because he cannot excuse his procedural default of his *Bailey* claim. Likewise, plenary review to address this Court's mootness doctrine with respect to challenges to convictions for which the sentence has been fully served is not warranted here because the special assessment makes it unnecessary to determine any broad legal question. Cf. *Ray* v. *United States*, 481 U.S. 736, 737 (1987) (declining to determine the role of the concurrent sentence doctrine in the federal courts because the special assessment made the sentences not concurrent).

3. For similar reasons, plenary review is not warranted to resolve any disagreement among the courts of appeals on how to apply the presumption that criminal convictions have collateral consequences. As petitioner observes (Pet. 17, 18-19), the courts of appeals have expressed different views about whether the presumption is rebuttable. The Ninth Circuit has held that the presumption is irrebuttable because "[o]nce convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state [repeat offender] laws." *Chacon* v. *Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), superseded on other grounds, 28 U.S.C. 2253(c). Accordingly, that court has concluded that "there is simply no way ever [for the government] to meet the *Sibron* mootness requirement: that there be 'no possibility' of collateral

legal consequences." *Chacon*, 36 F.3d at 1463. No other circuit, however, has ruled out the possibility that the presumption may be rebutted in a particular case.

Nevertheless, that inconsistency between the Ninth Circuit's approach and the decisions of the other circuits does not warrant this Court's review. As the Ninth Circuit has observed, both the federal Sentencing Guidelines and the sentencing schemes of many States rely on prior convictions as a basis for penalty enhancements. See *Chacon*, 36 F.3d at 1463. Thus, even in those circuits that hold open the theoretical possibility of rebuttal, the prospect of future enhancements based on a felony or misdemeanor conviction can seldom, if ever, be ruled out.

The government is aware of only two published court of appeals' decisions holding that a collateral attack on a criminal conviction was moot because there was no possibility of collateral consequences from the conviction, and neither of those decisions has significant continuing precedential value. In *Malloy* v. *Purvis*, 681 F.2d 736 (11th Cir. 1982), the court of appeals found that a defendant's collateral attack on a forgery conviction was moot. But the defendant in that case had, following the forgery conviction, been sentenced to life imprisonment without parole, and the forgery conviction was not one of the prior offenses relied upon by the sentencing court in imposing that sentence. See *id.* at 739 n.2; *id.* at 739 (Wisdom, J., specially concurring). Moreover, the Eleventh Circuit has questioned the vitality of *Malloy* in light of subsequent cases, *Minor* v. *Dugger*, 864 F.2d 124, 126, 127 (1989), and has made clear that, notwithstanding *Malloy*, a challenge to a criminal conviction is not moot "where the conviction *could* be used for enhancement purposes." *Id.* at 126.

In *Broughton* v. *North Carolina*, 717 F.2d 147, 148-149 (4th Cir. 1983) (per curiam), cert. denied, 466 U.S. 940 (1984), the Fourth Circuit dismissed as moot a habeas attack on a misdemeanor contempt-of-court conviction for which the petitioner had served 30 days in jail, because the court concluded that the conviction did not create any risk of a future sentence enhancement under the state sentencing law then in effect. *Id.* at 149 (citing N.C. Gen. Stat. §15A-1340.4 (1981)). Like *Malloy*, however, *Broughton* does not appear to be of continuing significance. The conviction at issue in *Broughton* now could result in a sentence enhancement under the United States Sentencing Guidelines. See Guidelines §§ 4A1.1(c), 4A1.2(c)(1) (directing sentencing court to increase criminal history score based on prior sentences of 30 or more days imposed on misdemeanor convictions, including contempt convictions). Moreover, a later Fourth Circuit decision has narrowed *Broughton*'s impact. See *Nakell* v. *Attorney General of North Carolina*, 15 F.3d 319, 322-323 (4th Cir.) (attorney's habeas challenge to criminal contempt conviction not moot under *Broughton* because of possible refund of fine and prospect of disciplinary action by bar), cert. denied, 513 U.S. 866 (1994).

There is also not any significant disagreement among the courts of appeals about who has the burden of demonstrating the presence or absence of collateral consequences from a criminal conviction. Those courts of appeals that have addressed the issue require the party asserting mootness to overcome the presumption that collateral consequences result from a challenged criminal conviction. See, *e.g.*, *Minor*, 864 F.2d at 125; *Bryan* v. *Duckworth*, 88 F.3d 431, 433 (7th Cir. 1996). The government is not aware of any court of appeals that has held to the contrary. None of the decisions

cited by petitioner as placing the burden of proof on the criminal defendant (Pet. 19-20 & n.9) actually discussed the issue of which party has the burden of proving or disproving that a criminal conviction has sufficient collateral consequences to preclude mootness. Moreover, two of the decisions did not even involve habeas petitions or motions under 28 U.S.C. 2255 challenging prior convictions. The Third Circuit's decision in *Steele* v. *Blackman*, 236 F.3d 130 (2001), involved a challenge to an alien exclusion order based on the classification of a prior offense as an "aggravated felony," and the First Circuit's decision in *Arnold* v. *Panora*, 593 F.2d 161 (1979), involved a civil suit. Thus, there is no reason for this Court to grant review to address the burden of proof issue.

In any event, this case does not provide an appropriate vehicle for review of any disagreement among the courts of appeals on the questions whether the presumption of collateral consequences is rebuttable, and, if it is, who bears the burden of proof. Petitioner himself asserts (Pet. 18-20) that his Section 2255 motion would be justiciable in all but the Eighth Circuit. See Pet. 15 n.7. As discussed above, petitioner suffers from a concrete consequence of the challenged Section 924(c) conviction—his liability for the $50 special assessment imposed by the district court at sentencing. Accordingly, his case is not moot regardless of whether the presumption of collateral consequences is rebuttable and of who bears the burden of proof.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration.

Respectfully submitted.

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(3)

No. 01-1340

In the Supreme Court of the United States

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In its Brief for the United States ("U.S. Br."), the government "agrees" with petitioner Arnold Hohn that "the court of appeals' decision conflicts with decisions of this Court" (U.S. Br. 9) and that the jurisdictional analysis adopted by the Eighth Circuit "cannot be reconciled" with this Court's cases emphasizing that a challenge to a criminal conviction can ***never*** be moot when the conviction could be used to subject the petitioner to an enhanced sentence for a subsequent crime. U.S. Br. 11 (citing *Evitts* v. *Lucey*, 469 U.S. 387 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *Benton* v. *Maryland*, 395 U.S. 784 (1969); *Sibron* v. *New York*, 392 U.S. 40 (1968)).

When the United States confesses error, this Court's typical practice is to enter an order granting the writ of certiorari, vacating the judgment below, and remanding the case for further proceedings in light of the government's new position ("GVR"). See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 248-249 (7th ed. 1993). That is the disposition requested by the Solicitor General in this case. See U.S. Br. 17.

While Hohn appreciates the government's confession of error, he respectfully disagrees with the government's proposed disposition of this case. The government's suggestion of GVR in light of the government's changed position would be appropriate in the great run of cases, in which the parties' agreement on the question presented would be binding on remand on the court of appeals. This case, however, involves an issue of subject-matter jurisdiction, in which the agreement of the parties would ***not*** be binding on the court below.

The government's proposed disposition would place the case back before the Eighth Circuit with the parties in agreement that Hohn's case is justiciable. But that was precisely the situation confronting the court below following

briefing on the merits. Notwithstanding both parties' insistence that jurisdiction was present, the court decided to "disagree" (Pet. App. 11a) and dismiss the case as moot. In the absence of some indication to the Eighth Circuit that its analysis disregarded this Court's precedent — and a GVR order would not necessarily convey that message — there is a significant danger that the court will simply reapply its departure from the governing rule of law on remand.

For that reason, petitioner submits that the proper disposition in this case is a summary reversal pursuant to Rule 16.1. Only a summary reversal will ensure that the court below applies the correct rule of law on remand and in subsequent cases. The government's brief also indicates that there are at least "two published court of appeals' decisions holding that a collateral attack on a criminal conviction was moot because there was no possibility of collateral consequences from the conviction." U.S. Br. 14 (citing *Malloy* v. *Purvis*, 681 F.2d 736 (11th Cir. 1982); *Broughton* v. *North Carolina*, 717 F.2d 147 (4th Cir. 1983)). While the government argues that Hohn's case does not merit full briefing and argument on the questions presented, it acknowledges the existence of precedent from the Fourth and Eleventh Circuits that should not be followed. Again, only a summary reversal in this case — in which the Court expresses its disapproval of those precedents — can eliminate the danger of that occurrence as well.

The parties agree that the jurisdictional analysis employed by the Eighth Circuit below disregarded this Court's precedent. A summary reversal is necessary to ensure that the error engaged in by the court below and by other courts of appeals does not recur. Thus, petitioner Arnold Hohn respectfully requests that this Court summarily reverse the decision below and confirm its longstanding precedent that a challenge to a criminal conviction can never be moot when the challenged

conviction could be used to enhance the sentence for a subsequent offense.

CONCLUSION

For the reasons set forth above, the petition should be granted, and the decision below should be summarily reversed.

Respectfully submitted.

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